WHEBY ET AL. V. MOIR ET AL.*

Supreme Court of Appeals.

June 16, 1904.

FRAUDULENT CONVEYANCES—GROUNDS OF INVALIDITY—EVIDENCE—SUFFICIENCY—APPEAL—JURISDICTION.

1. To set aside a sale as fraudulent as to creditors, it must be alleged and proved that the sale was made with intent to defraud, of which intent the buyer had knowledge.
2. Evidence in a suit to set aside a sale of a stock of merchandise and other goods as fraudulent towards creditors examined, and *held* insufficient to charge the buyer with knowledge of the seller's fraudulent intent.
3. Where, in a suit to set aside a conveyance as fraudulent as to creditors, the various sums decreed against the purchaser in favor of several creditors exceed in the aggregate the amount necessary to confer jurisdiction on the Supreme Court of Appeals, the appeal by the purchaser will not be dismissed because the sum due to the parties summoned as appellees is less than $500, where there is a general appearance by counsel for appellees; and, in the absence of such general appearance, the court will direct process to issue against the parties not served.

Appeal from Corporation Court of Roanoke.

Suit by one Moir and others against Jabborein E. Wheby and another. From a decree for plaintiffs, defendant J. E. Wheby appeals. *Reversed.*

Edward Lyle and *S. H. Hoge,* for appellant.

H. T. Hall, for appellees.

KEITH, P.

The appellees filed their bill in the Corporation Court of the city of Roanoke, in which they alleged that Charles Wheby had for some time past been conducting a general merchandise store in that city; that they had extended credit to him upon the faith of goods contained in his store; and that on June 18, 1902, he and his wife executed a deed of bargain and sale to one Jabborein Elias Wheby of all their stock of merchandise and other goods and chattels. The alleged consideration for this deed was the sum of $1,053.39, cash in hand, the receipt of which was acknowledged.

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The bill alleges that the said conveyance of June 18, 1902, is fraudulent, and that no part of the consideration mentioned was paid; that it was executed for the purpose of hindering, delaying, and defrauding the creditors of Charles Wheby, and especially the complainants, in the collection of their debts—a fraud of which the said Jabborein Elias Wheby had knowledge and in which he participated.

The defendants answered, and admitted the purchase and sale of the stock of merchandise, goods and chattels; alleged that it was for a valuable consideration paid in cash; and denied that it was made for the purpose of hindering, delaying and defrauding the creditors of Charles Wheby in the collection of their debts, but, on the contrary, alleged that the several articles enumerated in said conveyance were sold in good faith for a valuable consideration, and without fraudulent intent.

Numerous depositions were taken, and the case came on to be heard before the Corporation Court, which decreed that the sale of the stock of goods referred to in the bill be set aside and annulled, as made with intent to hinder and delay the creditors of Charles Wheby. From that decree the purchaser, Jabborien Elias Wheby, obtained an appeal.

It is settled by the decisions of this court that, where fraud is relied upon to set aside a conveyance, it must be plainly averred and distinctly proved. In this case it was necessary to aver and prove that Charles Wheby executed the bill of sale of the merchandise and other goods and chattels which passed by his deed of the 18th of June, 1902, with intent to hinder, delay, and defraud his creditors, of which intent the vendee, Jabborien Elias Wheby, had knowledge.

It may be conceded that Charles Wheby, the vendor, was actuated by the intention to defraud his creditors, but the proof is wholly insufficient to bring home knowledge of such purpose to his vendee. The vendor and vendee are brothers, and form part of a colony of Syrians living in the city of Roanoke, most of whom appear to be engaged in merchandising. Jabborien was a peddler. He seems to have been industrious and frugal. The percentage of profit from the business in which he was engaged is believed to have been large. His expenses were insignificant. The evidence which he adduces is to be found in the testimony of those with whom he had business transactions. They are people of his own race and nation,

whose manners, habits, customs and methods of business are very different from ours. They speak our language imperfectly and appear to understand it with difficulty. It cannot be denied that these circumstances place them somewhat at a disadvantage. It is true that this may work both ways, and that, while it may render it more difficult for them to establish the truth of a transaction, if it be a fair one, it, on the other hand, renders more difficult the discovery of fraud, where it has been perpetrated. They come before this court, however, attended by all the presumptions of innocence. We cannot assume their guilt because they are strangers, nor condemn them as dishonest because they are ignorant of our language, our customs and our laws.

The proof is that the whole of the purchase money was paid in cash in the presence of witnesses, and the individuals are named from whom Jabborein Wheby collected the several sums which, added together, made up the price he paid for the goods. There is no evidence that he knew that Charles Wheby was indebted, or that he entertained the purpose of defrauding his creditors. There are slight circumstances of suspicion. They appear to have taken unusual precautions with reference to the execution of the conveyance, and the inventory and transfer of the possession of the goods which passed under it, and it is argued that men engaged in an honest transaction do not anticipate the accusation of fraud. It is true that "the wicked flee when no man pursueth," but, on the other hand, the absence of witnesses might have subjected them to the imputation that there was something to conceal. In our opinion, the testimony falls far short of that probative force which is necessary to establish a fraud.

Upon the merits of the case, therefore, we are of opinion that the Hustings Court erred in setting aside as fraudulent the deed of June 18, 1902.

It is claimed on the part of appellees that the case is not properly before this court, because the sum due to the parties who have been summoned as appellees is less than $500, which was necessary to give this court jurisdiction at the date when the appeal in this case was allowed.

The decree appealed from is copied into the petition for appeal. It appears from an inspection of that decree that the several sums decreed against the appellant aggregated more than $500, and it is conceded that, under the decisions of this court, it had jurisdic-

tion to entertain this appeal if the process had been issued against all of the creditors named in the decree appealed from. When the petition and record were presented to the judge of this court, and the appeal awarded, its effect was to bring up for review the entire record, so that any error to the prejudice of appellant might be corrected, and, if it were necessary to protect appellant in the enjoyment of this right, we would now direct process to issue against those parties upon whom it has not been heretofore served, in order that what is at most an omission on the part of the clerk might be corrected; but counsel, by entering a general appearance for appellees, have obviated the necessity for this, all of the appellees having identical interests in this controversy.

We think the motion to dismiss should be overruled, and, this court proceeding to enter such decree as the Hustings Court ought to have entered, it is ordered that the decree complained of be reversed, and the bill of complainants be dismissed, with costs to the appellant.

NOTE.—The amount in controversy necessary to give jurisdiction to the Court of Appeals is the second point considered by the court. Jurisdiction as to appeals in matters merely pecuniary, being limited to $300 (formerly $500, section 3455 of the Code, amended by Acts 1902-'3-'4, p. 590), the jurisdiction is determined by the amount of the plaintiff's claim, or by the amount to be paid by the defendant, as one or the other is appellant. In calculating the amount involved in the decree appealed from, all costs are excluded, and interest is not estimated beyond date of decree. The matter in controversy must not only be of value of $300 (formerly $500), but the controversy in relation to matter of that value must be continued by appeal; and, although action was for more than the jurisdictional amount, when the verdict was for less, an appeal does not lie for the defendant; or, in other words, as to the defendant, the amount in controversy is the amount of the judgment, with interest to date of judgment or decree, and not to date of application for appeal; but, as to plaintiff, it is the amount for which suit is brought. *Gage* v. *Crockett*, 27 Gratt. 735; *Eacho* v. *Cosby*, 26 Gratt. 112; *Harman* v. *Lynchburg*, 33 Gratt. 37; *Fink* v. *Denny*, 75 Va. 663; *Hawkins* v. *Greshan*, 85 Va. 34, Barton's Ch. Pr. 1110. And it is not that which may or may not come in question. *Hawkins* v. *Greshan*, 85 Va. 34.

Under Rule IX of the court, the amount in controversy as to appellee, is the difference between the sum claimed by him as of date of decree appealed from, and the amount decreed in his favor by such decree. *Ware* v. *Banker*, 95 Va. 680. See *Wilson* v. *Wilson*, 93 Va. 546.

The amount decreed against the appellant is the amount in controversy as to him, and not the several amounts decreed to the appellees. If the

aggregate of sums decreed against the appellant exceeds $300 ($500) an appeal lies, although the amount decreed to no one of appellees amounts to $300 ($500). *Hicks* v. *Roanoke,* 94 Va. 741.

It is clear from this latter case that the court in the case at bar followed the rules laid down in the many cases on this subject. C. B. G.

RATLIFF V. RATLIFF ET AL.*

Supreme Court of Appeals.

June 16, 1904.

CHANCERY PRACTICE—BILL OF INTERPLEADER—WITNESS—COMPETENCY—DESCENT OF REALTY—FRAUDULENT CONVEYANCE—CURTESY.

1. One who has been induced by a party to convey land to him which, on the face of the contract, belonged to others, and is threatened with suit in consequence of this act, may, in a suit to enforce his vendor's lein, convene all parties in interest, and have their respective rights determined and the deed reformed.
2. A witness otherwise incompetent is made competent for all purposes if called by the other party to the litigation.
3. An equitable interest in real estate descends just as a legal estate.
4. One who has conveyed land to another to defraud his creditors is estopped from denying the validity of the conveyance.
5. A husband is not entitled to curtesy in the statutory separate estate of his wife, which he has created for her benefit without reservation of his marital rights.

Keith, P., and Cardwell, J., dissenting.

Appeal from Circuit Court, Washington county.

Action by John B. Hamilton against M. S. Ratliff and others. From the decree, M. S. Ratliff appeals. *Reversed.*

Daniel Trigg and *L. P. Summers,* for appellant.

White & Penn and *M. H. Honaker,* for appellees.

HARRISON, J.

In the fall of 1886 John B. Hamilton executed to Lucinda Ratliff and John R. Ratliff, one of her sons, a title bond for a tract of land near Abingdon, Va., in consideration of $6,500, of which $3,000 was paid in cash, the residue being evidenced by the joint bonds of the vendees. On the 11th of January, 1887, for reasons

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